



July 19, 1999

Ms. Linda Cloud
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR99-2021

Dear Ms. Cloud:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125773.

The Lottery Commission (the "commission") received one request for pricing proposals submitted to the commission by Scientific Games International ("SGI") and Pollard Banknote Limited ("Pollard"). Another request was made for the cost proposals submitted by Pollard and Oberthur Gaming Technologies ("Oberthur"). The commission has been notified by SGI and Pollard that these companies consider their respective information to be confidential. Oberthur notified the commission that it viewed the price proposals as public information, but also stated that if "any proposer should claim an exception from required disclosure and such exception is granted, this exception must be applied to all proposers equally."

As provided by section 552.305 of the Government Code, this office provided Oberthur, SGI, and Pollard the opportunity to submit reasons as to why the information at issue should be withheld. Oberthur asserted no exceptions to disclosure. Both SGI and Pollard, in correspondence to this office, assert that their respective information is protected from disclosure by sections 552.101, 552.104, and 552.110 of the Government Code. Because Oberthur raised no exception to disclosure, the Oberthur pricing information must be released. We will address the claims made by SGI and Pollard.

Both SGI and Pollard assert the applicability of section 552.104 to the records at issue. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a *governmental body's interests* in a commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 at 4 (1990). Release of the proposals before the contracts have been finally approved could damage the

governmental body's ability to obtain negotiate favorable contract terms. However, as the commission has not raised section 552.104 nor indicated that it is applicable in this situation, the information at issue is not excepted from disclosure pursuant to section 552.104. Since section 552.104 protects the interest of the commission, and the commission does not assert the applicability of section 552.104, we need not further address this exception.

Scientific and Pollard also assert that sections 552.101 and 552.110 protect the requested information. Section 552.101 protects from disclosure information that is otherwise confidential by law. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 at 2 (1991).

Scientific and Pollard both discuss *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks*, as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314796 (Tex. App.--Austin May 20, 1999, no pet. h.). Neither SGI nor Pollard cite to a statute or judicial decision that makes the commercial or financial information privileged or confidential. The requested information may not be withheld from disclosure under the commercial or financial information prong of section 552.110.

SGI asserts that its pricing proposal is a trade secret protected from disclosure under section 552.110. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the

business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). SGI has not shown that its pricing information falls within the definition of a protected trade secret as a formula, process or device for continuous use. This information may not be withheld as a "trade secret."

As the pricing proposals are not protected from disclosure under sections 552.101, 552.104, or 552.110, they must be released. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Kay Hastings
Assistant Attorney General
Open Records Division

KKH/RHS/ch

Ref: ID# 125773

Encl. Submitted documents

cc: Mr. Rolando Pablos
Oberthur Gaming Technologies
9999 Westover Hills Boulevard
San Antonio, Texas 78251-4199
(w/o enclosures)

Ms. Elizabeth Knight
Scientific Games International
1500 Bluegrass Lakes Parkway
Alpharetta, Georgia 30004
(w/o enclosures)